

The Nixon Papers: December 1988 Release

Background

With a few exceptions not relevant here, all White House records generated during the Nixon Presidency are currently in the possession and custody of the National Archives and Records Administration. Previous Presidents had treated their records as their own personal property, taking them away with them when they left office and generally donating them to Presidential libraries, with whatever exceptions and under whatever conditions they wished to make. In 1974, however, Congress enacted the Presidential Recordings and Materials Preservation Act, note following 44 U.S.C. § 2111, which directed the government to take possession of the Nixon White House records and prepare them for release to the public.

Until December 1, 1986, none of these records had yet been made available to the public. Former President Nixon fought their release through litigation, and five sets of proposed Archives regulations have been invalidated or withdrawn. On February 26, 1986, the Archives proposed the regulations which at present govern release of the Nixon files. Under these regulations, the Archivist reviews the Nixon files, returning private and personal material to Richard Nixon and removing material that falls into six specified categories, including classified material, law enforcement investigatory material, trade secrets, and material the disclosure of which would constitute a clearly unwarranted invasion of privacy. None of the material so removed is publicly disclosed. Once this material has been segregated, the Archivist announces his intent to release publicly the remainder of the material, subject only to an opportunity for interested parties to assert any legal or constitutional right or privilege that would prevent or limit disclosure. The regulations provide that the Archivist will wait a minimum of 30 days after making such an announcement before actually disclosing any records, and it is during that period of time that a sitting or former President may examine the records and, if necessary, assert claims of executive privilege.

Since then three segments of former President Nixon's papers have been released to the public. In September of 1986, the Archivist announced his intention to open certain portions of the General Files for public inspection beginning on December 1 of that year. The General Files consist of the routine White House documents created during the Nixon Presidency; they were categorized in some instances by subject matter and in others by the name of the individual in whose files the documents were stored.

During the month of November, representatives of the Department of Justice, the Office of the United States Trade Representative and the White House reviewed selected portions of the General

Files scheduled for release to determine whether it would be necessary for the President to make any assertions of executive privilege in order to prevent specific disclosures. An early sampling had strongly suggested that these records (most of which involved domestic matters) were not sensitive ones, and we found it sufficient to review only those files most likely to contain sensitive material. No privileged material was located, and no assertions of executive privilege were made. On December 1, 1986, therefore, 1.5 million pages of Nixon White House records were made available to the public.

On January 30, 1987, the Archivist announced that the Nixon White House Special Files would be made available to the public beginning on May 4, 1987. The Special Files were more sensitive than the General Files; they had been segregated into a separate filing system by the Nixon White House precisely for that reason. Consequently, a larger team of reviewers from several government departments and agencies was assembled under the supervision of the Office of the Counsel to the President and a more detailed review was conducted. Those reviewers examined representative portions of the Special Files. No records were located with respect to which it was deemed necessary to recommend that an assertion of privilege be made. Certain records were located, however, which, under regulations promulgated by NARA, were required to be withheld. When NARA was informed that these records had been placed among those scheduled to be made publicly available, NARA segregated them and indicated its intention to protect them from disclosure.

Finally, in the Spring of 1988, the Archivist announced his intention to open additional materials in the Nixon General Files to the public, starting on March 22, 1988. The sensitivity of those documents fell somewhere between those of the two earlier releases, because while they were general and not special files, unlike the first release of general files many of the files in that release dealt with foreign rather than domestic matters. Again, no records were located requiring an assertion of executive privilege, although certain records were located which, under regulations promulgated by NARA, were required to be withheld. NARA again segregated these documents, most of which contained materials that were or should have been classified, and indicated that it would protect them from disclosure.

The Archivist has now announced his intention to open approximately 500,000 pages of material in the Nixon General Files on December 9, 1988. The same general concerns that were raised by disclosures of these earlier sets of files are implicated by the forthcoming disclosure of general files. Because these files are general files and deal with mostly domestic and not foreign matters, the sensitivity of these documents is not likely to be high.

Asserting Executive Privilege

These documents are all thirteen or more years old, and the vast majority will not raise any colorable issue of executive privilege. Our standard for making such an assertion is quite demanding. Briefly put, we will not assert executive privilege unless disclosure of the relevant record would seriously and adversely effect ongoing Administration activities. It does not matter if a document is embarrassing or politically sensitive. If it contains nothing more, it will be disclosed.

Certainly, anything that has already been made public -- such as press clippings, press releases and speeches -- can be passed over without examination. If something has already been released, a second release is unlikely to be harmful.

There are, however, matters that will require careful scrutiny. These records may contain, for example, material on sensitive deliberations involving law enforcement investigations, foreign relations, and domestic and foreign intelligence. While Archives has already attempted to segregate out all classified material and will not release that materials, we cannot be certain that all material that would be deemed sensitive now would have been classified back then. Moreover, as evidence by our experience with past releases, in very rare instances classified material has inadvertently been left in the files. Accordingly, we need to conduct our own review with some care.

Reviewing the Files

Each of the General Files is grouped under a subject matter category. Each set of files is accompanied by an index, or "finding aid," prepared by the Archives staff. You have all been provided with a copy of the complete package of finding aids. The finding aids describe the material contained within the files, but at varying levels of generality. Some are extremely helpful, and list the subject matters addressed within individual boxes ("containers"). Others, unfortunately, provide less guidance.

In consultation with the Office of Legal Counsel at the Department of Justice, Counsel's Office has placed each of the files under the responsibility of one of the departments/agencies participating in the review. In allocating files, we have noted on the finding aids themselves certain containers which appear to include records requiring review. We expect that in most if not all cases, the reviewers will need to go beyond our listing and review a greater number of containers within each file than those we have specified. The listing merely identifies some containers that, in our judgement, simply cannot be passed over.

Consequently, the first task for each participant in this review is to review the finding aids for the particular files he or she has been assigned and to note whichever containers in addition to

those we have specified are likely to be sensitive and require review. In determining which containers in the assigned files require review, participants should be guided by the summaries of sensitive issues and subject matters attached to this memorandum, which were prepared by each of the departments/agencies involved in the "Special Files" review as well as their own knowledge of the material s their departments/agencies would consider sensitive. For those files which do not appear to have particularly sensitive containers, participants should develop a random sampling procedure -- for example, the first quarter of four separate boxes -- which will allow the reviewer to determine the general character of the contents of the files as well as whether any sensitive records are likely to be found.

Although we have tried to allocate responsibility, where possible, so that the subject matter of the file in question matches to some extent the expertise of the reviewing department/agency to which it has been assigned, the varying subject matters are often intermingled within the same files. Consequently, all reviewers will be acting as generalists, reviewing their files for material that implicates interests of the government as a whole. It will often be necessary to check with the representatives of the other departments/agencies in determining whether a specific entry in a finding aid refers to a matter which requires that a file be reviewed.

The process of review is likely to be a full-time task over the course of two to three days. Review takes place at a branch of the Archives, located at 845 South Pickett Street in Alexandria, Virginia. The names of all the reviewers will be furnished to the Archives officials, and they will be informed that each of your represents the United States Government and should be given unrestricted access to the General Files to be released on December 9. They will provide a reading room for your use, furnish the containers you request, and answer any questions you might have about their system of filing and segregating. The Archives officials in charge of the Nixon Papers project are Joan Howard and Jim Hastings, and they can be reached at 756-6498. 9:30

As you review the files, you may often find it necessary to check with other reviewers to determine whether a particular record which you have reviewed, and which appears to implicate the interests of one of the other departments/agencies, does in fact raise a serious issue of privilege. You will also be fielding such inquiries yourself from the other reviewers. In doubtful cases, it is best to ask -- the earlier we identify potentially privileged records, the better.

The review must be completed by Tuesday, November 29. By then, each reviewer should know whether his department/agency wishes to recommend any assertion of executive privilege with respect to specific documents. The November 29 deadline will ensure that there is enough time to submit any such recommendation for White

House review at the highest level, and reach a decision before the files are opened.

Each reviewer should keep careful notes of which files he has reviewed and what he has found. For each file, a brief summary should be prepared. The summaries will then be collected and submitted for our files. Some sample summaries prepared with respect to the previous three reviews are attached as examples.

Patricia Mack Bryan

Attachments